

ENTERED

September 24, 2019

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

RENE G. HERNANDEZ,

Plaintiff,

VS.

TIENDAS CUADRA US LLC,

Defendant.

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CIVIL ACTION NO. H-19-269

ORDER

The court heard arguments on Tiendas Cuadra's motion to dismiss Rene Hernandez's amended complaint. (Docket Entry Nos. 25, 27). As stated on the record, the motion is granted, without prejudice and with leave to amend the age-discrimination claim.

To state a claim under the Age Discrimination in Employment Act, a plaintiff must allege facts that show that: (1) she is within the protected class; (2) she is qualified for the position; (3) she suffered an adverse employment decision; and (4) she was replaced by someone younger or treated less favorably than similarly situated younger employees. *Leal v. McHugh*, 731 F.3d 405, 410–11 (5th Cir. 2013) (citing *Smith v. City of Jackson*, 351 F.3d 183, 196 (5th Cir. 2003)). A plaintiff must eventually prove, by direct or circumstantial evidence, that age was the but-for cause of the alleged adverse employment action, not merely a motivating factor. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009).

A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Hernandez has alleged only that she is within the protected class; was fired "for no apparent reason"; was told that a "Corporate decision" was made after a two-hour meeting, leading to her dismissal; and she was replaced by

a 26-year-old woman two weeks later. (Docket Entry No. 25 at 3–4). These allegations do not plausibly state a claim that Hernandez was fired because of her age.

Hernandez has identified additional facts that may not make amendment futile. The court has discretion to grant or deny leave to amend and “should freely give leave when justice so requires.” *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 232 (5th Cir. 2012); FED. R. CIV. P. 15(a)(2). Hernandez may amend her complaint one more time, **no later than October 11, 2019**.

SIGNED on September 24, 2019, at Houston, Texas.

A handwritten signature in black ink, reading "Lee H. Rosenthal". The signature is fluid and cursive, with a large, sweeping loop at the end of the last name.

Lee H. Rosenthal
Chief United States District Judge